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SUPREME COURT, U.S.

No. 07-96

In the Supreme Court of the United States

CONCERNED COMMUNITY INVOLVED DEVELOPMENT, INC.,
Petitioner,

v.

CITY OF HOUSTON, TEXAS, CANDLELIGHT DEVELOPMENT JOINT VENTURE, CANDEV, L.C., CANDLELIGHT PLACE DEVELOPMENT, LLC, and LAZER CONSTRUCTION COMPANY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Fourteenth Court of Appeals of Texas

PETITIONER'S REPLY BRIEF

DAVID MELASKY
Counsel of Record
2777 ALLEN PARKWAY,
SUITE 1000
HOUSTON, TEXAS 77019
713-965-9984-TELEPHONE
713-526-2708-FACSIMILE
Counsel for Petitioner

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PETITIONER'S REPLY BRIEF

The case at bar involves a challenge to the unconstitutional procedures employed by the City of Houston in issuing permits to developers authorizing the private design and construction of bridges and road modifications without allowing any form of participation by adjacent property owners who will be impacted by the proposed facilities. The City Ordinance specifying this permitting process has remained unchanged throughout the pendency of this suit. The controversy presented to this court is whether this permit issued by the City is constitutionally infirm due to the violations of the procedural due process rights of adjacent homeowners. Since this procedure continues to remain in effect, the adjacent property owners could be further impacted by future permits issued to Respondent Candlelight Development Joint Venture or a successor in interest to Candlelight using the same constitutionally flawed procedure. Moreover, the language of the ordinance would require removal of the disputed facilities if the permit were adjudicated to be invalid. Accordingly, the questions presented to this court regarding Respondent's assertions of mootness are:

1. Can a Fourteenth Amendment procedural due process challenge to the issuance a permit be moot if the unconstitutional procedure remains in effect and the adjacent property owners are subject to a continuing potential to be subjected to the denial of procedural due process in the granting of future permits which affect their homes?

2. Is a procedural due process challenge to a permit moot based on the assertion that the permitted facilities have been built if the permitting regulations themselves would require removal of the unpermitted construction should the

permit be declared void?

The case falls within "capable of repetition yet evading review" exception to mootness.

This court has long recognized that cases, such as the case, *sub judice*, are within an exception to mootness where:

> "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and
> (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Federal Election Commission v. Wisconsin Right to Life Inc.*, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ____, No. 06-969 (2007), quoting Spencer v. Kemna, 523 U.S. 1, 17 (1998)

In the recent case of *Federal Election Commission v. Wisconsin Right to Life, supra,* this court addressed a claim of mootness based on the FEC's assertion that the disputed political ads were related to an election which had already occurred and thus the controversy had been mooted. In rejecting this claim, this Court noted that the party seeking relief could not predict future disputes in sufficient time to litigate the issue prior to the the disputed statutory blackout period for political ads and thus the "too short to be fully litigated" requirement was met. In addition, this Court found that the "capable of repetition" requirement of a reasonable expectation that the complaining party would be subject to the alleged illegal conduct was satisfied by the expressed intention of the complaining party to run the disputed political ads in future and that there was no reason to believe that the FEC would refrain from future prosecutions based on the disputed ads.

In the oft cited case of *Nebraska Press Assn. Et Al v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976), this Court rejected a claim of mootness based on the expiration of an order restricting pre-trial publicity where the orders had terminated by its own terms upon the empaneling of the jury in the underlying criminal case. Applying the "capable of repetition, yet evading review" doctrine, the Court noted that because of the possibility of a new trial in the event of an appellate reversal of the criminal case giving rise to the controversy and because the Nebraska Supreme decision would allow future court orders such as the order being disputed in the case then before the Court, the controversy would likely reoccur between the complaining media parties and the state and the brief duration of the disputed pre-trial orders would thus evade review if the controversy was considered moot. Similarly in *Gannett Co. v. Depasquale*, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979) this court applied *Nebraska Press Assn. supra*, finding again that a controversy over pre-trial order is not mooted by the expiration of the order where review can not be completed prior to the termination of orders of such short duration and the controversy is likely to reoccur. Likewise, in *Edgar v. Mite Corp. Et Al, 457 U.S. 624,* 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982), the Court held that a challenge to the constitutionality of a state anti-takeover statute was not mooted by an U.S. District Court's injunction against enforcement of the statute since the state officer charged with enforcement intended to proceed with the enforcement of the statute if the judgment of the trial court were to be reversed. The "capable of repetition, yet evading review" was held to defeat an assertion of mootness in *Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988), where a disabled student claiming statutory educational benefits was determined to be entitled to have his appeal heard by this Court even though not currently faced with the denial of such benefits since the denial of benefits the disabled petitioner complained

of was likely to reoccur due to which the nature of the petitioner's disability (aggressive conduct) which would likely create the same misconduct issues giving rise to the issues presented in the appeal before the Court. See also *City of Erie v. Pap's AM*, 529 U.S. 277, 120 S. Ct. 1382, 146 L.Ed.2d 265 (2000) (owner who closed business and sold the property involved in challenge to obscenity ordinance did not render case moot since owner could re-open a similar business elsewhere.)

This case at bar falls squarely within the "capable of repetition yet evading review "doctrine enumerated by the Court in cases cited above. The City ordinance under which the disputed permitting procedures are employed remains unchanged and in effect. The homeowners whose property has been impacted by the issuance of the permit contested in this appeal are thus subject to future city permit issuances without procedural due process which could again affect their property. Moreover, the opinion of the Texas Court of Appeals in this cause deprives all property owners of any procedural due process rights except when a compensable taking is alleged. Since no provision is made by the City for participation by affected property owners in permitting under Article II of Chapter 4O of the City of Houston Ordinances, there is no chance for review prior to permit issuance (and the construction authorized by such permits which can begin immediately upon permit issuance).

Finally, the issue before the court in the case at bar is whether a permit issued by the City of Houston is void since the procedures employed by the City in approving the permit violated procedural due process as to the owners of nearby homes. If the permit is declared void for unconstitutionality, then according to City Ordinances, the unpermitted work must be removed from the roadway. (See City of Houston Ord. Sec.

40-46 in App. 3 to Petition for Review). Thus relief can still be granted by this court and this case is not moot.

The constitutional validity of the City's action is not determined by whether the bridge and roadway modifications authorized by the disputed permit has been constructed or not. The issue of whether the homeowners who live adjacent to the bridge and its approaches were entitled to procedural due process in the permit approval process is a continuing issue whether or not a bridge is physically present.

CONCLUSION

The property owners affected by the disputed permit have been denied their procedural due process rights to participate in the process of permit issuance before the City of Houston grants a permit to a private entity which will impact their property. This permit procedure remains in effect and can affect these homeowners again without adequate time for review. Accordingly, Respondent's claim of mootness is without merit.

Respectfully submitted,

DAVID MELASKY
Counsel of Record
2777 ALLEN PARKWAY, SUITE 1000
HOUSTON, TEXAS 77019
Tel: (713) 965-9984
Fax: (713) 526-2708